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No. 1025

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

JOSEPH NAPLES,

Petitioner,

vs.

E. L. MAXWELL, WARDEN, OHIO PENITENTIARY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit reversed a decision of the United States District Court for the Southern District of Ohio, Eastern Division, denying respondent's motion to set aside a writ of habeas corpus. It remanded the case to the district court with instructions to vacate its order and to conduct a hearing on the merits. The opinion of the appellate court reads as follows:

> "Per Curiam. This is an appeal by the State of Ohio on behalf of E. L. Maxwell, Warden, Ohio Penitentiary, respondent-appellant, from an order of the United States District Court, for the Southern District of Ohio, denying the motion of the respondent to

vacate an order granting the petition of Joseph Naples, petitioner-appellee, for a writ of habeas corpus.

"The petition was properly filed in the District Court after the petitioner had exhausted his state remedies. (Sections 2241 (a) (c) (3) and 2254, Title 28, U.S.C.) At a second hearing on the petition in the District Court, on October 27, 1964; the district judge directed counsel for both parties to file briefs on the questions of whether or not failure to afford the petitioner a preliminary hearing in the Municipal Court of Youngstown, Ohio, denied the petitioner his constitutional right to due process and of what effect a consent to search would have upon the search warrant.

"Briefs were accordingly filed and a hearing was had in the court on December 22, 1964. At this hearing counsel appearing for the respondent, an assistant to the Attorney General of Ohio, recommended to the trial judge that the writ be granted on the ground that the petitioner 'was deprived of his constitutional right in that due process was not had in the courts at Youngstown, Ohio.' Counsel further recommended that in the 'interest of justice' the case be remanded to the Municipal Court at Youngstown. These recommendations were contrary to the tenor of counsel's brief which was then before the court.

"The district judge said, in response to the recommendations,

> 'Well, if the State of Ohio feels that due process has not been followed in this case and that in the interest of justice the writ ought to issue, the Court is inclined to follow the recommendations of the Attorney General of Ohio and the defendant will be remanded for trial, with the proviso that he be placed under a $10,000 bond, that he be tried within 60 days or be discharged in accordance with the order of this Court.'

An order of the court was entered accordingly on December 23, 1964. In this order the district judge remanded the petitioner to the Common Pleas Court of Mahoning County. There was no determination of the petition on the merits.

"The petitioner posted bond for $10,000 and was released. A motion was promptly filed on December 28th on behalf of the respondent to vacate the order granting the writ. The motion was filed under Rule 60 (b) of the Federal Rules of Civil Procedure. It was claimed that the assistant to the Attorney General was guilty of neglect in that he had no authority to make the recommendation for the petitioner's release. Another part of the motion sought to strike the language of the recommendation from the record.

"The assistant who made the recommendation was discharged by the Attorney General. Uncontradicted evidence, including an affidavit and testimony of the assistant, to the effect that the assistant had no authority to make the recommendation was submitted to the court. Subsequently, on August 24, 1965, the district judge denied the motion to vacate the order of December 23, 1964 and this appeal followed. A judge of this Court granted a stay of execution, pending appeal, of that part of the order providing for trial in sixty days.

"Upon consideration of the briefs of counsel and upon the record in the case, we conclude that there was neglect of duty on the part of the assistant to the Attorney General, and that this was excusable and could not have been avoided on the part of the Attorney General, the counsel for the respondent. The district judge was in error in denying the motion to vacate the order granting the petition for a writ of habeas corpus. Because of this neglect and in the interest of justice, under Rule 60 (b) (6) of the Federal Rules of Civil Procedure, the order of August 24, 1965, denying the motion to vacate the order of December 23, 1964, is vacated and set aside. The case is remanded to the District Court with instructions to vacate the order of December 23, 1964 and to conduct a hearing for the determination of the petitioner's rights on the petition and the respondent's answer thereto."

Petitioner's only assigned reason, in support of the granting of a writ herein, is that the holding of the court "is not conciliable with existing rules of law and decisions concerning the same matter."

The background upon which the appellate court made its decision is as follows:

Petitioner, on July 2, 1964, filed a petition in the United States District Court for the Southern District of Ohio, Eastern Division, alleging that he had been denied his constitutional right to due process of law for the reason that he was convicted on the basis of evidence obtained pursuant to an invalid search warrant. This petition contained a request for bail. On July 15, 1964, respondent filed a brief contra to the motion for temporary bail, pending trial hearing and determination of the merits. A hearing was held in the district court on August 12, 1964, on petitioner's motion for bail. On October 27, 1964, respondent filed a return of writ denying each and every allegation in the cause except that petitioner had exhausted his remedies in the State of Ohio. On the same day a hearing was held in the district court wherein petitioner's trial counsel appeared as a witness and was questioned in regard to petitioner's motion to suppress evidence and the lack of a preliminary hearing in the Municipal Court of Youngstown, Ohio. As a result of said hearing counsel for both parties were directed by the court to submit briefs on the questions of whether or not failure to afford petitioner a preliminary hearing in the Municipal Court of Youngstown, Ohio, denied him his constitutional right to due process and what effect a consent to search would have upon the search warrant. On November 2, 1964, petitioner filed his memorandum in accordance with this instruction and on November 18, 1964, the memorandum of respondent was filed. All of the pleadings filed by respondent denied that any constitutional right of petitioner had been violated. The memorandum specifically denied that any constitutional right had been violated as a result of his failure to be afforded a preliminary hearing, for the reason that

in Ohio, a preliminary hearing is not considered to be a critical stage in the proceedings in that a defendant can lose no rights as a result of his not having been afforded one. At that time Mr. John Cianflona handled all federal habeas corpus actions in the Office of the Attorney General and signed all the aforementioned pleadings. Then on December 22, 1964, a hearing took place before the district court, at which hearing the following occurred:

> " 'The Court: In the matter of the application of Joseph Naples for petition for writ of habeas corpus, No. 7157. At the previous hearing the Court advised counsel if you had anything further to offer you would be afforded the opportunity of doing so, and that is the reason for the hearing this morning.
>
> " 'Are you ready to proceed?
>
> " 'Mr. Duffy: We are ready, if Your Honor please.
>
> " 'The Court: You may enter your appearances.
>
> " 'Mr. Duffy: Dan W. Duffy, 1030 National City East Sixth Building, Cleveland, Ohio.
>
> " 'Mr. Lappen: Hubert D. Lappen, Logan, Ohio.
>
> " 'Mr. Cianflona: John Cianflona, Assistant Attorney General, Columbus, Ohio, for the Respondent.
>
> " 'The Court: The Court will hear you, Mr. Cianflona.
>
> " 'Mr. Cianflona: If the Court please, after the last hearing in which one of the former attorneys who defended this case in Youngstown and the testimony was taken, we submitted briefs as best we could at the Court's request. The briefs are before the Court. I feel that in the interest of justice this man was deprived of his constitutional right in that due process was not properly had in the courts at Youngstown, Ohio, and that in view of that circumstance I can't see but what the Court would have to grant the writ under the circumstances, if that is the Court's intentions. I don't know.
>
> " 'The Court: If I understand you correctly, Mr. Cianflona, you are recommending to this Court that the writ be granted due to the fact that due process was not followed by the courts?

" 'Mr. Cianflona: And in the interest of justice.

" 'The Court: And for that reason the Attorney General of Ohio is recommending that the writ be issued.

" 'Mr. Cianflona: That the case be remanded to the Municipal Court at Youngstown in accordance with the prayer of the petition.

" 'The Court: I assume you gentlemen are satisfied with that speech, you don't want to make one?

" 'Mr. Duffy: I don't think I could do any better, your Honor.

" 'The Court: Well, if the State of Ohio feels that due process has not been followed in this case and that in the interest of justice the writ ought to issue, the Court is inclined to follow the recommendations of the Attorney General of Ohio and the defendant will be remanded for trial, with the proviso that he be placed under a $10,000 bond, that he be tried within 60 days or be discharged in accordance with the order of this Court.

" 'Is there anything further in connection with the case?

" 'Mr. Duffy: Nothing from us, if Your Honor please.

" 'The Court: Are you prepared to give bond?

" 'Mr. Duffy: We are prepared, if Your Honor please.

" 'The Court: Upon the furnishing of bond in the amount of $10,000, the order of the Court will be carried out. Is there anything further?

" 'The petitioner is not released from custody until the bond is executed.

" 'Mr. Duffy: Will he be released here if we make the bond in this court?

" 'The Court: Yes. The bond is given for his appearance before that court.

" 'Mr. Duffy: May I suggest to the Court that he be released to the care of the Marshal of this Court so that when we make the bond here he will be released by the Marshal?

" 'The Court: How soon are you prepared to make the bond?

" 'Mr. Duffy: Right now, Your Honor.

" 'The Court: He is in the custody of the State of Ohio until the bond is given. There is a certain amount of administrative work to be done, Mr. Duffy, and this bond and the order of the Court will have to go on. I wish you gentlemen would prepare the order and submit it to the Court immediately. You have a reporter here. Submit your order to the Court in accordance with the ruling of that Court.' "

" 'I hereby certify that the foregoing is a true and accurate transcript of my notes taken at the time indicated.

/s/ IRMGARD E. MODLICH,
Official Court Reporter,
United States District Court,
Southern District of Ohio.' "

The position taken by Mr. Cianflona in this hearing was diametrically opposed to that taken in the memorandum filed by him in the case. On the afternoon of December 22, 1964, Mr. Cianflona acquainted his immediate superior, Mr. David L. Kessler, of his actions and the decision of the district court as a result thereof after Mr. Kessler had been questioned as to the reason therefor by certain press reporters and had asked Mr. Cianflona for an explanation.

On the morning of December 23, 1964, Mr. Kessler, Mr. Cianflona, and counsel for petitioner appeared in the office of the district court, at which time the court was informed by Mr. Kessler that Mr. Cianflona's actions were contrary to the position of the Attorney General, that he had taken the action he did without the authority of the Attorney General, and in fact, his action was contrary to his expressed instructions not to concur in the granting of a writ of habeas corpus without the approval of the Attorney General. Counsel for both parties refused to concur in the order granting the writ of habeas corpus as it was entered. The order remanded petitioner to the Common Pleas Court of Mahoning County, Ohio for further proceedings

and granted him bail, conditioned upon his appearance before that court. The position, therefore, of the Attorney General, was known to the district court before the order was entered.

Thereafter on December 28, 1964, respondent moved the district court to set aside and strike from the record the order filed therein on December 23, 1964. After other pertinent pleadings, in support and contra to this motion, and an affidavit of John Cianflona had been filed, a hearing was held before the court on April 15, 1965. Then after other briefs had been filed and motions had been made, the court, on August 24, 1965, entered an opinion and order overruling respondent's motion to set aside and strike from the record the order entered on December 23, 1964. On September 2, 1965, petitioner filed a notice of appeal to the United States Court of Appeals, Sixth Circuit, and after the briefs of the parties had been filed, oral arguments were presented to the court on October 12, 1966. The court's decision of November 4, 1966, reversing the district court and remanding the case thereto for further action, is the basis for the petition herein.

SUMMARY OF ARGUMENT

Petitioner has presented only one reason why this Court should grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review three questions presented in his petition. While none of the questions presented were ruled upon in their present form by the court of appeals, by the very thrust of the opinion of the court, all were implicitly answered. In order to have concluded as it did, the court of appeals necessarily found that the movant [respondent] met the required degree of proof to warrant it to reverse the district court. Whether the court substituted its discretion for that of the district court in determining issues of fact, specifically was not answered. It was not necessary that factual determinations be made because it was apparent from the opinion of the district court that it applied erroneous standards of law. [The district court had held that to vacate the judgment it was necessary for the respondent to show fraud, duress, collusion, or bribery.]. The court of appeals did find that there was excusable neglect of duty on the part of the assistant to the Attorney General and that this neglect was excusable and could not have been avoided by the Attorney General, counsel for respondent. This also was one of the standards for granting relief in the Court of Appeals. In deciding the question concerning the presumption of an attorney to have the authority to agree to a consent judgment, the district court again used an improper standard of law. An attorney has no implied authority to consent to judgment against his client. Express authority is necessary and there was none here. The crucial difference between the decisions of the two courts below is not whether the evidence supported the findings made by them or whether the appellate court substituted its discretion for that of the district court or whether there was evidence to overcome certain pre-

sumptions, but whether the district court used the proper conclusions of law. Respondent had contended throughout the proceedings in both courts that the district court used wrong conclusions of law and this position was upheld by the court of appeals. In essence, respondent contends that petitioner has failed to present "special and important reasons" why certiorari should be granted, because such reasons simply do not exist. Petition for a writ of certiorari should be denied.

Argument

I. The United States Court of Appeals for the Sixth Circuit Did Not Err in Reversing the Decision of the United States District Court Denying a Motion to Vacate Order Granting a Petitioner for a Writ of Habeas Corpus under Rule 60 (b) (6), Federal Rules of Civil Procedure When the Court Found from the Briefs of Counsel and Upon the Record in the Case That There Was Neglect of Duty on the Part of an Assistant to the Attorney General, and that this Constituted Excusable Error and Could Not Have Been Avoided on the Part of the Attorney General, the Counsel for the Respondent.

Rule 60 (b), Federal Rules of Civil Procedure, provides in pertinent subsections as follows:

> "3. RULE 60 (b), FEDERAL RULES OF CIVIL PROCEDURE
>
> " ' * * * * * * * * *
>
> " '(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> " '(1) mistake, inadvertence, surprise, or excusable neglect; * * * (6) any other reason justifying relief from the operation of the judgment. * * *' "

Respondent, in relying upon Subsection (b) (1) of the above rule, contended before the district court that when Mr. Cianflona, without the expressed authority of the Ohio Attorney General to do so, recommended the issuance of the writ of habeas corpus in order to remand the case to the Youngstown Municipal Court, particularly when there was no basis for such a procedure in the law, his action constituted excusable neglect. This position was supported by the United States Court of Appeals, Sixth Circuit, in its opinion reversing the decision of the district court.

Mr. Cianflona, in a memorandum, filed on November 18, 1964, pursuant to the request of the district court, signed by him, and prepared in the officer over which he had responsibility in federal court cases stated:

> "A preliminary hearing in Ohio is not a critical step in criminal procedure. It is only an inquest to determine whether there is a probable cause to bind an accused over to a grand jury for further investigation of the charges against him. No rights or defenses are lost therein as such rights and defenses as prevail in a particular case are always subject to attack after indictment and before trial."

In support of this contention he cited both state and federal cases. *Clarke v. Huff,* 119 F. 2d 204 (D.C. Cir. 1941); *State ex rel. Adams v. Rigg,* 89 N.W. 2d 898; *Crider v. Maxwell,* 187 N.E. 2d 875. When, therefore, in open court at the December 22, 1964 hearing, he stated that in being deprived of his municipal court prehearing, petitioner was not afforded due process, certainly this subsequent position was suspect. It is notable that his changed opinion was not supported by any reference to interim court decisions. He mentioned none. That he knew of the contents of the memorandum is evident from his statement that "If the Court please, after the last hearing in which one of the former attorneys who defended this case in Youngstown

and the testimony was taken, we submitted briefs as best we could at the Court's request. The briefs are before the Court. * * *"

When, therefore, the district court was apprised of the fact that Mr. Cianflona had no expressed authority to recommend the issuance of a writ of habeas corpus, and that, in fact, his recommendations were not supported by legal precedent, but rather were in direct conflict therewith and further when it was apparent that even the recommendations to remand directly to the municipal court did not comport with standard practice, it was an abuse of its discretion in not vacating the judgment.

The district court took the position that the recommendation of Mr. Cianflona amounted to a consent judgment and that an assistant attorney general had the implied authority to effect such a consent. This was an erroneous position for two reasons:

At the outset it was evident that Mr. Cianflona believed that if there was any violation of due process, it occurred in the Youngstown Municipal Court, and that the case should be remanded to that court. When, therefore, the district court remanded the case to the Mahoning Court of Common Pleas, not only did Mr. Cianflona refuse to approve the order, but so did counsel for petitioner. Therefore, it cannot be contended that a consent to the judgment was, in fact, made.

Secondly, the order of the district court, in remanding the case to the trial court for such "further proceedings as deemed necessary and proper in accordance with law" created an impasse. The real question before the court concerned the legality of a search. This question was not decided. The trial court had had jurisdiction by virtue of the indictment returned by the grand jury. A motion to suppress the contested evidence had been made and ruled upon

against petitioner. This ruling was affirmed by the Court of Appeals and the Supreme Court of Ohio. The district court, therefore, having made no finding of fact, or conclusions of law, furthermore, having written no opinion whatever, left the trial court in an untenable position. To have proceeded as "deemed necessary and proper in accordance with law", the trial court, under the law of Ohio, as it existed then and now, could have proceeded only as it had theretofore done. The district court had provided no guidelines to indicate in what manner it should have done otherwise.

Excepting the contention of the district court that the recommendation of Mr. Cianflona amounted to a consent judgment for the purpose of argument, respondent submits that in so doing the court provided its own basis for the abuse of discretion that it committed. It is well settled that the authority of an attorney to consent to a judgment or to compromise and settle a case is presumed in the absence of an affirmative showing to the contrary. *United States v. Beebe,* 180 U.S. 343 (1901); *Hot Springs Coal Co. v. Miller,* 107 F. 2d 677 (10th Cir. 1939). However, that presumption is rebuttable and the leading case of *United States v. Beebe, supra,* make that clear. In *Beebe,* this Court, at page 352, stated:

> "A judgment entered upon such a compromise *is subject to be set aside* on the ground of the lack of authority in the attorney to make the compromise upon which the judgment rests. *Prima facie,* the act of the attorney in making such a compromise and entering or permitting to be entered such judgment is valid, because it is assumed the attorney acted with *special* authority, *but when it is proved he had none, the judgment will be vacated on that ground.* Such judgment will be set aside upon application in the cause itself if made in due time or by a resort to a court of equity where relief may be properly granted." (Emphasis added.)

Specifically see *Holker v. Parker,* 7 Cranch (U.S.) 436 (1813), in which Chief Justice Marshall, speaking for the court, stated that an unauthorized compromise is in itself void and ought not to bind the parties.

Other grounds sufficient for relief under Rule 60 (b) have been found in an attorney's mere error in a stipulation. *Griffin v. Kennedy,* 344 F. 2d 198 (D.C. Cir. 1965); a client's lack of knowledge of and consent to a dismissal for lack of prosecution, characterized as excusable neglect, *Cavallo v. Agwilines,* 2 F.R.D. 526 (S.D. N.Y. 1942); an attorney's mistaken belief of authority to consent, *McGinn v. United States,* 2 F.R.D. 562 (D.C. Mass. 1942); and the failure of a party to fulfill his promise upon which the consent judgment was entered, *L. M. Leathers' Sons v. Goldman,* 252 F. 2d 188 (6th Cir. 1958).

Although not in and of itself a ground for relief from a consent judgment under Rule 60 (b) the absence of a hearing and decision on the merits of the case is a major factor to be taken into consideration by the court in order to accomplish substantial justice when ruling on a motion to set aside or to vacate. *United States v. Beebe, supra, Cuthill v. Ortman-Miller Machine Co.,* 216 F. 2d 336 (7th Cir. 1954), and *Cavallo v. Agwilines, supra.* Similarly, *United States v. Throckmorton,* 98 U.S. 61 (1878); *Foman v. Davis,* 371 U.S. 178 (1962); *Hayes v. Philadelphia Transportation Company,* 312 F. 2d 522, 523 (3rd Cir. 1963); *Keohane v. Swarco,* 320 F. 2d 429 (6th Cir. 1963); and *Alles Corporation v. Senco Products, Inc.,* 329 F. 2d 567 (6th Cir. 1964), in part stand for the proposition that under the liberalized Federal Rules of Civil Procedure, a hearing and determination on the merits of the case is greatly favored.

This is particularly true in this case where the only constitutional issue presented in the original petition remains

undecided and no criteria has been afforded the trial court which it can use as a basis for further proceedings. The United States Court of Appeals, Sixth Circuit, cited Section 60 (b) (6) to support its finding that justice required the vacation and setting aside the order of the district court.

It remains then to determine whether or not there was evidence before the district court to substantiate respondent's contention that Mr. Cianflona had no expressed authority to enter into what was considered by the court to constitute a consent judgment. In an affidavit of John Cianflona, filed on February 10, 1965, he stated that the action that he undertook in recommending the remand to the Municipal Court at Youngstown was not authorized by his employer, and the district court acknowledged during the hearing his familiarity with the affidavit as follows: "Yes, his [John Cianflona's] statement and affidavit are in the record" and "You [Mr. Kessler] filed it in the case, it's a part of the record in the case", and in answer to the question "and what did you tell Mr. Cianflona?", Mr. William Saxbe, Attorney General of Ohio, testified with respect to instructions given to assistants handling habeas corpus cases:

> "I told him that the general rule was that we resisted these petitions in all the courts, that there were occasions that came to light through habeas corpus proceedings where they should be granted; that in the absence of discussion on these facts we should resist, but where these facts did appear that we should agree with the Court."

This was denied by Cianflona. However, his subsequent statement that he had not discussed the matter either with Mr. Saxbe or Mr. Kessler, before taking the action that he did, bears out respondent's contention that he had no expressed authority to act as he did.

It is apparent that throughout the hearing on the motion to vacate the district court's criteria for granting relief under Section 60 (b) (2), that there was a necessity to show collusion, fraud, or bribery. The court, in answer to Mr. Kessler's statement that "it seems to me I should be able to show what he had in mind", stated: "You have to show some collusion, some fraud, some bribery", and later "if you have any evidence showing collusion, if you have any evidence showing misconduct other than a violation of instructions, if you have any evidence of bribery, you ought to produce it." Whereas the elements of this criteria definitely would provide a basis for relief, certainly they were not inclusive as the authorities cited hereinbefore indicate.

The order of the Federal district court granting the writ of habeas corpus implicitly was based on the fact that petitioner had been denied a preliminary hearing. Respondent does not dispute the fact that petitioner did not have a preliminary hearing in the Municipal Court of Youngstown, Ohio. He was, however, indicted by the grand jury, arraigned on the indictment, and admitted to bail while accompanied by counsel of his own choosing; he filed motions to suppress evidence, which were overruled by the trial court, and after conviction, appealed a judgment of sentence through the court of appeals to the Supreme Court of Ohio. His judgment of conviction was affirmed by both appellate courts.

In Ohio a preliminary hearing is designed only to determine if a crime was, in fact, committed and if there is probable cause to believe that the accused committed it. *Clark v. Maxwell,* 177 Ohio St. 49, 50, 201 N.E. 2d 882; *Crider v. Maxwell,* 174 Ohio St. 190, 192, 187 N.E. 2d 875. These cases also make it clear that in Ohio no rights are waived nor defenses lost either at a preliminary hearing

or by the lack of one, and this Court consistently has held that an examination (preliminary hearing) or the opportunity for one prior to formal accusation is not required under the "due process" clause of the constitution. *Lem Woon v. Oregon,* 229 U.S. 586, 590 (1913); *Ocampo v. United States,* 234 U.S. 91 (1914); *Lawn v. United States,* 355 U.S. 339, 350 (1958), 2 L ed 2d 321; *Beck v. Washington,* 369 U.S. 541, 546 (1962). See also *Dillard v. Bomar,* 342 F. 2d 789 (6th Cir. 1965); *Pearce v. Cox,* 354 F. 2d 884 (10th Cir. 1965); *United States v. Smith,* 357 F. 2d 318 (6th Cir. 1966); *Byrnes v. United States,* 327 F. 2d 825, 834 (9th Cir. 1964), *cert. denied,* 377 U.S. 970; *United States v. Shields,* 291 F. 2d 798, 799 (6th Cir. 1961), *cert. denied,* 386 U.S. 933, *rehearing denied,* 368 U.S. 962. And the factual situation herein is practically on all fours with that in *United States v. Blue,* ... U.S. ... (1966), 16 L ed 2d 510, 514.

It appears, therefore, that the district court should have known that the basis for Mr. Cianflona's recommendation was not sound, particularly when respondent's memorandum, signed by him, and theretofore filed correctly stated the law with respect thereto.

II. Petitioner Has Not Presented Nor Are There Any "Special and Important Reasons" Why the Court Should Grant a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to Review Questions Presented by Petitioner.

United States Supreme Court Rule 19 provides in pertinent part:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controll-

ing nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law, or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioner sets forth as a basis for the granting of the writ herein that "the Sixth Circuit has created an entirely new and novel remedy in Federal Jurisdiction. The holding is not conciliable with existing rules of law and decisions concerning the same matters." He further alleges that "while the court [below] did not cite precedent it seemed to attempt to follow the theory that Rule 60 (b) (6) gives the court of appeals power to vacate judgments and/or orders whenever such action is appropriate to accomplish justice." Further "we are confronted here with a broadening of the existing decisions on the question of the 'power' of the Court to act as against the question of whether or not the facts give rights to the use of that power." He then says "in the instant case, the court of appeals found 'uncontradicted' evidence, including an affidavit by the attorney, that the attorney did not have authority to act."

None of the cases cited by petitioner in any way support a contention that the decision below was in conflict with the decisions of this Court or of any Federal Circuit Court of Appeals. And an analysis of his argument resolves itself into a question of whether the decision of the court

of appeals below was supported by evidence. The court, in its opinion, stated:

> "Upon consideration of the briefs of counsel and upon the record in the case, we conclude that there was neglect of duty on the part of the assistant to the Attorney General, and that this was excusable and could not have been avoided for the respondent. The district judge was in error in denying the motion to vacate the order granting the petition for a writ of habeas corpus. Because of this neglect and in the interest of justice, under Rule 60 (b) (6) of the Federal Rules of Civil Procedure, the order of August 24, 1965, denying the motion to vacate the order of December 23, 1964, is vacated and set aside. The case is remanded to the District Court with instructions to vacate the order of December 23, 1964 and to conduct a hearing for the determination of the petitioner's rights on the petition and the respondent's answer thereto."

If this Court is to find the decision of the appellate court to be reversible, it will necessitate a review of the evidence; and the court consistently has held that the issuance of a writ of certiorari would not be warranted merely to review evidence as follows:

> "There is nothing in the lower court's decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are estopped depends upon the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 68 L. ed. 413, 44 S. Ct. 164; United States v. Johnston, 268 U.S. 220, 227, 69 L. ed. 925, 926, 45 S. Ct. 496. * * *"
> *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938).

In *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950), this Court stated at pages 917 and 918:

> "* * * A variety of considerations underlie denials of the writ, and as to the same petition different rea-

> sons. * * * Narrowly technical reasons may lead to denials. * * * the judgment of the lower court may not be final; * * * It may be desirable to have different aspects of an issue further illumined by the lower courts. * * *"

See also *Sheppard v. Ohio,* 352 U.S. 910, 911 (1956) and *Martin v. Texas,* 382 U.S. 928 (1965).

Certainly in this case it is not only desirable, but imperative to have different aspects of the issue illumined in the district court, otherwise the meaningless remand by that court to the trial court leaves the trial court on the horns of a dilemma. There was no direction in the order of the district court to the trial court to indicate for what purpose the case was remanded or in what manner that court had erred in its conduct of the trial. The real question, not decided, concerns the allegation of a violation of petitioner's constitutional rights against an illegal search and seizure. In the interest of justice the appellate court sought to correct this situation.

In the case of *Rice v Sioux City Cemetery,* 349 U.S. 70 (1955) at page 79, the Court adopted a quotation from a decision in *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923), as follows:

> " 'If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, Inc., 261 US 387, 393, 67 L ed 712, 714, 43 S Ct 422."

CONCLUSION

There is very little in the case herein to render its settlement important to the "public" as opposed to that of the "parties". The important question of public interest involved herein is whether the action of the Youngstown Ohio Police Department violated the constitutional rights of a citizen against illegal search and seizure. This question was not decided by the district court and is not before this Court. It would appear to respondent rather that petitioner considers it important to him further to stymie the federal courts in deciding this question. Such is not the purpose of a writ of certiorari.

As heretofore set forth, no real and embarrasing conflict of opinion and authority between the circuit courts of appeal exists. Respondent, at least, has found none, and no case cited by petitioner discloses such a conflict.

Petitioner's every effort has been to prevent a federal court decision on the merits of his alleged constitutional deprivations and he hardly is in good faith in asking this Court to assist him in so doing. Respondent, wherefore, prays that the petition be denied.

Respectfully submitted,

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